SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1386

BEN KLEIN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Ben Klein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit. Counsel respectfully urge the Court, for the reasons particularized herein, to reverse the judgment of the Tenth Circuit summarily after issuing the writ. In the alternative, the case should be calendared for argument on the merits.

OPINION BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, which was captioned "not for routine publication," is reprinted in Appendix A, *infra,* pages 1a to 10a. The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 4, 1975 (Appendix A, *infra* page 10a). A petition for rehearing timely filed was denied on March 6, 1975 (Appendix A, *infra,* page 11a).

On March 10, 1975, petitioner filed, and served on counsel for the United States in the proceedings below, a motion in the United States Court of Appeals for the Tenth Circuit for stay of mandate pending application for a petition for writ of certiorari. On March 18, 1975, petitioner filed an application for extension of time in which to file a petition for writ of certiorari. Petitioner served this application on the Solicitor General of the United States and, although not required by the Court's rules, on counsel for the United States in the proceedings below. On March 19, 1975, Honorable Byron R. White, Circuit Justice for the Tenth Circuit, ordered that the time for filing a petition for writ of certiorari be extended to and including May 5, 1975.

Thereafter, on March 20, 1975, the United States filed a "Motion of United States to Publish Decision." (Appendix C, *infra,* pages 14a to 16a). In support of its motion, the Government stated, *inter alia,* that the Tenth Circuit's *Klein* decision enunciates—

> "new points of law making the decision of value as a precedent, and contains some legal issues not previously decided by the Tenth Circuit or the Supreme Court. The decision also contains points of law which, in our experience, will solve recur-

ring problems faced by the United States and expedite future trials of tax as well as non-tax matters." Appendix C, *infra*, page 14a

The Government then cited four of the issues raised in this petition as examples of the "new points of law making the decision of value as a precedent, and . . . some legal issues not previously decided by the Tenth Circuit or the Supreme Court."

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court's instruction to the jury on the issue of petitioner's criminal responsibility at the time of the offenses charged was so erroneous, misleading, and prejudicial as to require summary reversal.

2. Whether the psychiatrists and psychologist appointed by the trial court pursuant to 18 U.S.C. section 4244 for the sole and express purpose of examining petitioner to determine mental competency to stand trial may testify at trial as to petitioner's mental capacity to commit the offenses charged.

3. Whether in a net worth income tax evasion prosecution a summary chart prepared by a Government summary witness may be admitted into evidence if the summary witness represents that the chart is a summary of *all* of the evidence then in the case when, in fact, it summarizes *only* the Government's evidence and contentions.

4. Whether in a net worth income tax evasion prosecution in which the accused claims that he received

substantial cash gifts from a third party Government records showing that such third party did not file Federal gift tax returns may be admitted into evidence.

5. Whether in a net worth income tax evasion prosecution the defendant's Federal income tax return for a subsequent year may be admitted into evidence without a limiting instruction.

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C. section 4244, 1970 ed. and 26 U.S.C. section 7201, 1970 ed., set forth in Appendix B, pages 12a to 13a.

STATEMENT OF THE CASE

Petitioner, Ben Klein (hereinafter referred to sometimes as "Klein"), was found guilty after trial by jury in the United States District Court for the District of Colorado of willfully attempting to evade or defeat his 1966 through 1970 income taxes within the meaning of 26 U.S.C. section 7201. Jurisdiction of the District Court was based upon 18 U.S.C. section 3231.

Klein urged as a principal defense at trial that he was not criminally responsible at the time of the offenses charged because he was too mentally ill to have formed the specific intent of "willfully" evading his taxes at the time each of the five returns for the indictment years was filed.

The trial judge instructed the jury on the issue of Klein's mental capacity to commit the alleged crimes. In the course of his instructions, he gave the following charge:

> "A person is not criminally responsible for his conduct if, at the time of the conduct, as a result of

mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law.

"As applied to this case, the test for criminal responsibility on the part of the defendant means that before you may return a verdict of guilty, you must be convinced beyond a reasonable doubt that the defendant committed the act with which he is charged, if you find he did commit the act, he was mentally capable of knowing what he was doing, was mentally capable of knowing it was wrong, and was mentally capable of controlling his conduct." Transcript, page 2357 [1]

Prior to trial and upon motions filed by both the Government and petitioner, the trial court ordered a judicial determination of Klein's mental competency to stand trial pursuant to 18 U.S.C. section 4244. The court's order did not call for an examination as to Klein's mental capacity to commit the offenses charged. The court appointed a psychiatrist and allowed each of the parties to select doctors to examine petitioner. Thereafter, the court determined that Klein was mentally competent to stand trial.

Four doctors testified at trial that Klein was not legally sane at the time each of the tax returns in

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[1] Reference is to the transcript of the proceedings in the trial court as certified by the court reporter. The reporter stated in a letter to the Court of Appeals sent after the *Klein* case had been decided that she had omitted three words from a portion of this instruction on criminal responsibility. In its order denying Klein's petition for rehearing, the court concluded that the alleged omission of the three words made "no difference as to the conclusion reached nor as to the opinion heretofore filed." Appendix A, *infra*, page 11a. The Tenth Circuit did not act to alter the certified record presented to it.

question was filed. In addition, twelve lay witnesses and a handwriting expert testified as to Klein's erratic behavior and other incidents to support a finding of legal insanity. In rebutting this testimony, the Government called as expert witnesses the psychiatrists and the psychologist who had examined Klein to determine his competency to stand trial pursuant to 18 U.S.C. section 4244. These Government witnesses were allowed to testify as to petitioner's legal sanity at the time of the offenses charged even though their appointment to examine Klein was limited to the issue of his mental competency to stand trial and neither petitioner nor his trial counsel had been advised of the dual nature of their examinations.

The Government used the net worth method of proof. During the trial the Government introduced a number of summary exhibits and concluded its case with a summary witness who presented with the aid of a summary chart a calculation showing petitioner's alleged net worth during each of the indictment years and his alleged understatement of income and additional income tax liability for each such year. The Government's summary witness testified that he had prepared his summary chart on the basis of *all* of the exhibits and *all* of the testimony thus far introduced into evidence. In its brief on appeal the Government stated that the summary witness "heard *all* the testimony and examined *all* exhibits and *based his summary chart thereon* (T. 1208-1209)." Gov't. Br. at 48 (Emphasis added.) Despite the testimony of the summary witness and the allegations in the Government's brief on appeal, the Court of Appeals held that the summary witness "was put on the witness stand to summarize the Government's case, and not all of the evidence then

in." Slip. Op. at 12, Appendix A, *infra*, page 9a. The Court of Appeals was only partially correct. The summary witness and his chart did summarize only the Government's case, despite the representation of the witness to the contrary.

Klein claimed, *inter alia*, that he had received during the indictment years substantial cash gifts from his father, Sam Klein, who was not called as a witness at trial. The trial judge, over objection made both before and during trial, admitted into evidence records of the Internal Revenue Service (certificate of assessments and payments) showing that petitioner's father had not filed Federal gift tax returns during the years 1956 through 1970.

Over objection of Klein's counsel at trial, the trial court admitted into evidence, with no limiting instruction, petitioner's 1971 income tax return.

After the Court of Appeals entered its decision and captioned its opinion "not for routine publication," the Government filed a motion to publish the *Klein* decision on the grounds that it enunciates "new points of law making the decision of value as a precedent, and contains some legal issues not previously decided by the Tenth Circuit or the Supreme Court." Appendix C, *infra*, page 14a (See discussion, *supra* pages 2 to 3.)

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT

Introduction

This Court has specifically directed lower Federal courts to scrutinize with great care the utilization of the net worth method in the enforcement of the criminal sanctions of the internal revenue laws because it is so fraught with dangers for the innocent. *Holland* v.

United States, 348 U.S. 121, 129 (1954), wherein the following guidelines were promulgated:

> "Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear,* including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (Emphasis added.)

Despite the admonitions and directions of *Holland,* in the instant case neither the trial court [2] nor the Court of Appeals [3] exercised the "great care and restraint" required by this Court.

Counsel urge that the trial court's patently erroneous and clearly prejudicial charge to the jury on the issue of Klein's mental capacity to commit the alleged offenses requires summary reversal. In any event, the continuing availability of that charge in future cases in the Tenth Circuit and the other questions raised

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[2] In addition to the errors raised herein, highly inflammatory documents and statements of little probative value were allowed into evidence, such as political campaign literature distributed by petitioner while he was campaigning for reelection as a state legislator.

[3] The Government in its brief on appeal (page 36) noted that, since *Holland,* the Tenth Circuit has affirmed every net worth tax evasion case it has reviewed, except one which was reversed on grounds not pertinent to the net worth method.

herein present important questions of Federal criminal law which have not been, but should be, settled by this Court, including at least one question which presents a conflict between circuits. On all issues other than the instruction, the United States has expressed its substantial agreement with our characterization of this case in its motion to publish the opinion of the Tenth Circuit, reprinted herein in Appendix C.

A. The Trial Court's Instruction on the Standard for Criminal Responsibility Requires Summary Reversal

The trial judge instructed the jury that there were three essential elements of the offenses charged. As to the third element, the judge instructed, *inter alia:*

> "A person is not criminally responsible for his conduct if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law.
>
> "As applied to this case, the test for criminal responsibility on the part of the defendant means that before you may return a verdict of guilty, you must be convinced beyond a reasonable doubt that the defendant committed the act with which he is charged, if you find he did commit the act, he was mentally capable of knowing what he was doing, was mentally capable of knowing it was wrong, and was mentally capable of controlling his conduct." Transcript, page 2357

This charge to the jury is patently erroneous and amounts to a directed verdict on the issue of Klein's mental capacity to commit the offenses charged. The instruction requires the jury to find *only* that Klein

committed the acts charged. Under the instruction as given, once the jury found that Klein did commit the acts, then it was directed by the trial judge to find without further deliberation that he was mentally capable of knowing what he was doing, was mentally capable of knowing it was wrong, and was mentally capable of controlling his conduct. Such an instruction cannot be allowed to stand as a proper instruction on the standard for criminal responsibility in the Tenth Circuit or in any other circuit. It must be rejected by this Court.

Despite the egregious and prejudicial error in the judge's charge to the jury, the Court of Appeals held that the instruction did not constitute plain or grave error infringing on the fundamental rights of the accused. It stated:

> "[S]ince no objection was made at the proper time, the *apparent meaning,* rather than the construction urged on appeal by defendant, must have been accepted." Slip Op. at 6-7, Appendix A, *infra,* page 5a (Emphasis added.)

Counsel are at a loss to determine what "apparent meaning" this instruction can have other than the interpretation we set forth above. Even the Government conceded in its brief on appeal that the instruction was ambiguous, although it cavalierly attempted to dismiss the ambiguity as a "vague and obscure ambiguity which appears only in the instruction when reduced to writing." Gov't. Br. at 59. In point of fact, if the instruction is read *aloud*—as we urge the Court to do—the patent error to which we refer is even *more glaring* than when the instruction is merely read.

In any event, even if the "apparent meaning" of the instruction given by the trial judge were an acceptable

standard for criminal responsibility, the Tenth Circuit should not have considered the instruction by reference to such a standard. It was totally inappropriate and serious error for the Court of Appeals to assume or speculate that the jury knew and accepted the correct law and disregarded the judge's bad law as to an essential element of the crimes charged—an element which involved the principal defense proffered at trial.

The reasoning of the Tenth Circuit, if accepted, requires the conclusion that a lay jury can be presumed to disregard bad law contained in an instruction, and somehow to decide the case on a proper standard. In rejecting such a suggestion, this Court has previously stated:

> "To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946)

A conviction cannot be allowed to stand "on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States, supra,* at 613. Yet here the charge to the jury was not only equivocal, it was clearly erroneous. This Court should conclude that the trial judge's instruction to the jury on the standard for criminal responsibility—an essential element of the alleged crimes and a primary defense of petitioner—was so erroneous, misleading, and clearly prejudicial as to require the issuance of a writ of certiorari and summary reversal. *See Yates* v. *United States,* 354 U.S. 298, 327 (1957); *Bihn* v. *United States,* 328 U.S.

633, 637-39 (1946); *M. Kraus & Bros., Inc.* v. *United States,* 327 U.S. 614, 626-27 (1946); *Bollenbach* v. *United States, supra; Screws* v. *United States,* 325 U.S. 91, 106-07 (1945).[4]

In any event, the approval of this instruction by the Tenth Circuit for use in future cases raises an important question in the administration of Federal criminal justice which should be settled by this Court.

B. Other Important Questions in the Administration of Federal Criminal Justice Should Be Reviewed by This Court

1. 18 U.S.C. Section 4244

The Court of Appeals, relying upon *United States* v. *Julian,* 469 F.2d 371 (10th Cir. 1972), held that no error was involved in allowing the psychiatrists and the psychologist, who had been appointed by the trial court under 18 U.S.C. section 4244 to examine Klein *solely* for the purpose of determining his competency to stand trial, to testify for the Government before the jury as to Klein's mental capacity to commit the offenses charged, even though examinations conducted pursuant to 18 U.S.C. section 4244 are different in nature and scope and require less than those designed to determine sanity for the purpose of criminal responsibilty. This holding is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Driscoll,* 399 F.2d 135 (2d Cir. 1968).

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[4] *See also United States* v. *Bass,* 490 F.2d 846, 853 (5th Cir. 1974); *United States* v. *Lee,* 483 F.2d 959, 960 (5th Cir. 1973); *United States* v. *Clark,* 475 F.2d 240, 248-51 (2d Cir. 1973); *United States* v. *Achtenberg,* 459 F.2d 91, 99 (8th Cir.), *cert. denied,* 409 U.S. 932 (1972); *United States* v. *Musgrave,* 444 F.2d 755, 762 (5th Cir. 1971); *Byrd* v. *United States,* 119 U.S. App. D.C. 360, 342 F.2d 939, 940-42 (1965); *United States* v. *Martell,* 199 F.2d 670, 672 (3d Cir. 1952), *cert. denied,* 345 U.S. 917 (1953).

Moreover, as conceded by the Government in its motion to publish the *Klein* decision, the court's decision on this point involves an important question in the administration of Federal criminal justice.[5]

In *United States* v. *Driscoll, supra,* the appellant had been found guilty of three counts of willfully and knowingly failing to file income tax returns under 26 U.S.C. section 7203. Prior to the commencement of defendant's first trial which ended in a hung jury, the court had appointed a psychiatrist under 18 U.S.C. section 4244 to determine defendant's mental competency to stand trial. On the basis of this psychiatrist's report, the court held that Driscoll was competent to stand trial. This same psychiatrist was allowed to testify at the first trial concerning Driscoll's mental condition in the indictment years as well as in years subsequent to the indictment years. Prior to Driscoll's second trial, a defense motion to suppress the psychiatrist's testimony on various ground was denied.

The only two issues presented during the second trial were whether the defendant acted willfully in failing to file his returns and whether he was mentally responsible for his actions. In rebuttal to defense evidence that Driscoll was not responsible, the Government called as a witness, over renewal of defense pre-trial objections,

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[5] The Government stated in its motion to publish:

> "*18 U.S.C. § 4244: Klein* is the first case of which we are aware that holds that government psychiatrists and psychologists, appointed under 18 U.S.C. § 4244 to examine a defendant as to his competency to stand trial, may also testify at trial as to the defendant's sanity at the time of the alleged commission of the offense *even though the original appointment did not expressly so provide,* where the defendant's sanity was 'in the case from the outset'." Appendix C, *infra,* page 16a (Emphasis added.)

the psychiatrist who had examined Driscoll under 18 U.S.C. section 4244. He testified that defendant was mentally responsible for his actions at the time of the alleged crimes.

The Second Circuit held (one judge dissenting) that it was unfair, absent adequate notice of a proposed dual use of his examination, to allow a psychiatrist appointed pursuant to 18 U.S.C. section 4244 for the sole purpose of determining defendant's competency to stand trial to testify also on the issue of defendant's criminal responsibility.

Although the Second Circuit in *United States* v. *Matos*, 409 F.2d 1245 (2d Cir. 1969), *cert. denied*, 397 U.S. 927 (1970), limited the *Driscoll* decision to its facts, the material facts in the *Klein* case are indistinguishable from the material facts in the *Driscoll* case. Thus, there is a conflict between the Tenth Circuit and the Second Circuit on this issue.[6]

We respectfully suggest that the reasons advanced by the Second Circuit in *Driscoll* in support of its con-

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[6] We recognize that other circuits are also in conflict with *Driscoll*. *See, e.g., United States*, v. *Malcolm*, 475 F.2d 420, 425-26 (9th Cir. 1973); *United States* v. *Jacquillon*, 469 F.2d 380, 389 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973); *Jones* v. *United States*, 109 U.S. App. D.C. 111, 284 F.2d 245, 248-49 (1960), *cert. denied*, 365 U.S. 851 (1961). However, the Ninth Circuit in *Malcolm*, a case in which the court's order did appoint the doctor for both purposes although no notice of the dual nature of the examination had been given to the accused or his lawyer, recognized the force in the defendant's argument that notice of the dual nature of the court's order should have been given. Nonetheless, the Ninth Circuit felt constrained, in light of its earlier precedent in *United States* v. *Mattson*, 469 F.2d 1234, 1236 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973), to reject the *Driscoll* decision "unless Mattson is overturned by our court en banc or by contrary Supreme Court authority. . . ." 475 F.2d at 425

clusion that it was unfair for the trial court, absent adequate notice to Klein or his counsel of the dual purpose of the examination, to have allowed the psychiatrists and the psychologist appointed pursuant to 18 U.S.C. section 4244 for the sole purpose of determining Klein's mental competency to stand trial to testify at trial on Klein's mental capacity at the time of the offenses charged are cogent and persuasive, and urge that the issue presented by the conflict between the circuits be resolved by this Court.[7]

2. Summary Witness and Summary Chart

During the course of the trial a number of summary exhibits were introduced by the Government through several summary witnesses. The Government concluded its case with a final summary witness, revenue agent Gehres, who presented with the aid of a chart a calculation of petitioner's alleged net worth during each of the indictment years and his alleged understatement of income and increased income tax liability for each such year.

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[7] If the Tenth Circuit's opinion is accepted and *Driscoll* is rejected, the potential prejudice to the accused is aggravated in the instant case. Even those courts which are in conflict with *Driscoll* recognize, as did both the majority and dissent in *Driscoll*, that the examination by a psychiatrist pursuant to 18 U.S.C. section 4244 must be sufficiently broad, intensive, and thorough to qualify him to testify on the issue of sanity at the time of the alleged crime. However, in the instant case, the scope of the section 4244 examinations by two psychiatrists (Drs. Montague and Egan) and the psychologist (Dr. Lassen), who testified for the Government at trial as to Klein's mental capacity to commit the offenses charged, was woefully incomplete, and it cannot be said "with fair assurance, after pondering all that happened" in this case that the verdict of guilty was not substantially swayed by the error. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)

Summary witness Gehres represented to the trial court and to the jury that his summary chart was based upon *all* the evidence received up to that point in time, and not just the Government's evidence and contentions.[8] (Transcript, pages 1208-1209 and 1259-1260) As described by the Government in its brief on appeal, witness Gehres "heard *all* the testimony and examined *all* exhibits and *based his summary chart thereon* (T. 1208-1209)." Gov't. Br. at 48 (Emphasis added.)

Despite the testimony of the witness and the Government's allegation that his summary chart was a summary of all of the evidence then in the record, the Tenth Circuit held—

> "*The witness was put on the witness stand to summarize the Government's case, and not all of the evidence then in.* It does not appear from the transcript that the jury could have been misled in any way concerning the summary chart." Slip Op. at 12, Appendix A, *infra,* page 9a (Emphasis added.)

The court's assertion as to the purpose for which agent Gehres *purported* to testify is flatly wrong. However, the Tenth Circuit is correct in describing what the witness in fact did after taking the stand. *Although he was proffered as a witness who would summarize all of the evidence in the case, he summarized only the Government's case.* That this course of action was highly prejudicial hardly needs explana-

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[8] Because of the representation of witness Gehres, no objection was made at trial by Klein's counsel to the summary chart.

tion.[9] *See Holland* v. *United States, supra. See also Flemister* v. *United States,* 260 F.2d 513, 517 (5th Cir. 1958); *Steele* v. *United States,* 222 F.2d 628, 629-31 (5th Cir. 1955), *cert. denied,* 355 U.S. 828 (1957).

Where the fundamental rights of an individual are involved, it cannot be assumed that the jurors in a net worth prosecution, after having been expressly told by witness Gehres that his summary chart represented *all* the evidence thus far introduced, realized that witness Gehres had in fact misled them by misrepresenting the nature of his summary chart.

This Court stressed in *Holland* that in a net worth case there is great danger that a jury may assume that once the Government has established its figures in its net worth computations the crime of tax evasion automatically follows:

> "The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." 348 U.S. at 128

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[9] For example, if the summary chart had been based on *all* the evidence then in the case, a substantial portion of the alleged understatement of income shown in the chart would have been negated. A summary chart based on *all* such evidence would have reflected that Klein had received $48,000 to $53,000 in cash gifts from his father during the indictment years, would have allowed as deductible items in computing Klein's tax liability over $20,000 in cash rental expenses which had been claimed as deductions on his tax returns for the years 1966 through 1970, and would have reflected a decrease of approximately $24,000 in Klein's net worth in 1966 attributable to the Klein-Thomas joint venture.

Each juror was given a copy of witness Gehres' summary chart during his testimony and during the closing arguments. In addition, the jurors requested that the exhibits, including the summary chart, be sent to them in the jury room. Although the trial judge gave instructions as to the nature and use of summary exhibits, he did *not* advise the jury that witness Gehres misrepresented the nature of his summary chart. Thus, the jury was erroneously led to believe, to the prejudice of petitioner, that *all* the evidence, and not just the evidence favorable to the Government's case, demonstrated that petitioner had substantially understated his income during each of the indictment years.

Significantly, in its motion to publish the *Klein* decision, the Government asserts:

> "STIPULATIONS AND SUMMARIES: *Klein* is the first case of which we are aware that makes it clear the government's summary witness was 'put on the witness stand to summarize the government's case, and not all the evidence then in.' *Klein,* at 12. Stipulations in cases of voluminous documents, whether tax cases or otherwise, are encouraged. A common problem in our experience has been the reluctance to stipulate defense exhibits into evidence during the government's direct case for precisely the reason raised by Klein, i.e., the government summary witness either has no opportunity or insufficient time to thoroughly examine defense exhibits prior to his testimony. *The clarity of this Court's decision on this issue will expedite future trials.*" Appendix C, *infra,* pages 15a to 16a (Emphasis added.)

The Court of Appeals misconstrued the record in this case and decided the summaries issue raised by petitioner on an erroneous premise. Yet the United States has informed the Tenth Circuit that the "clar-

ity of this Court's decision on this issue will expedite future trials." The fact that the Government intends to use this decision to expedite future trials raises a serious question in the administration of Federal criminal justice requiring the issuance of a writ of certiorari.

3. Certificate of Assessments and Payments

Petitioner claimed that he received between $48,000 and $53,000 in gifts from his father, Sam Klein, during the indictment years. The Government introduced into evidence a certificate of assessments and payments showing that Sam Klein had not filed any Federal gift tax returns during the years 1956 through 1970. Prior to trial, Klein's counsel filed written objections to the admissibility of certain proposed Government trial exhibits and specifically objected to the certificate of assessments and payments. At trial, defense counsel began to renew his objection to the introduction of the certificate, but was interrupted by the trial judge who ruled that he was going to admit the document into evidence. The trial judge gave no limiting instructions guiding the jury as to the inferences which could be drawn from the evidence in question. On appeal, Klein contended that the introduction of this document was prejudicial error. The Tenth Circuit held that there was no abuse of discretion by the trial judge in admitting the certificate of assessments and payments.

The United States concedes in its motion to publish the *Klein* decision that the court's holding involves a novel and important question in the administration of Federal criminal justice:

> "GIFT TAX RETURNS: *Klein* is the first case of which we are aware to decide the issue whether it

> is proper in meeting a claimed defense of large cash gifts from a third party to introduce evidence that the third party (here the father) failed to file any gift tax returns for the alleged cash gifts. *Klein*, at 2, 13. This is probative as to whether the alleged cash gift was, in fact, made. Alleged cash gifts, in our experience, are a recurring problem for the prosecution to meet in tax evasion cases. It would be useful in future cases to have this express example as one means that may be considered when the trial court is faced with exercising its discretion as to what evidence may be admissible in a particular circumstance." Appendix C, *infra*, page 15a

Because of the highly prejudicial effect of admitting this evidence both on Klein and on future defendants, this Court should decide whether, and to what extent, the evidence can be admitted.[10]

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[10] One cannot say with fair assurance that the evidence in question will not have a substantial influence on a jury, nor can one assume that a jury will consider only relevant, competent, and material evidence. *Cf. Murray* v. *United States*, 117 F.2d 40, 45 (8th Cir. 1941). Failure by a donor to file Federal gift tax returns can be attributable to the fact that, although he made gifts to the taxpayer, he negligently (*e.g.*, after taking into account the annual $3,000 exclusion under 26 U.S.C. section 2503(b), the gifts might not have exhausted the specific lifetime exemption allowed under 26 U.S.C. section 2521), or even willfully, failed to file gift tax returns as required by the internal revenue laws. Thus, the failure to file gift tax returns does not justify the highly prejudicial inference that no gifts were made. *In fact, the Government must have recognized that such an inference is insupportable since, to suit its own purposes in this case, the Government conceded that Sam Klein made cash gifts to petitioner during the indictment years totaling almost $11,000, even though it introduced the certificate of assessments and payments as "probative as to whether the alleged cash gift was, in fact, made."* Appendix C, *infra*, page 15a.

4. 1971 Income Tax Return

Over strong objection by defense counsel, the Government introduced into evidence petitioner's 1971 income tax return, even though the indictment years were 1966 through 1970.

On appeal, petitioner contended that the admission of the 1971 tax return was erroneous and highly prejudicial. Although the Government contended on appeal that the 1971 tax return had been admitted for a limited purpose, the Court of Appeals held that the return was admitted generally and without limiting instructions, but that its introduction into evidence did not involve an abuse of discretion by the trial judge. The Court of Appeals did admit that there is support in the case law for the view that the admission of the return is unduly prejudicial and improper, citing *United States* v. *Baum*, 435 F.2d 1197 (7th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971) and *United States* v. *Stoehr*, 196 F.2d 276 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952).

In its motion to publish the *Klein* decision, the Government, as one of its grounds therefor, asserted as follows:

> "SUBSEQUENT TAX RETURN: Not only has this issue not previously been decided by the Supreme Court or the Tenth Circuit, but *Klein* removes the uncertainty as to the present state of the law in the Tenth Circuit left by the statement in *Rose* v. *United States*, 128 F.2d 622, at 625 (10th Cir. 1942) (fn. 49, United States brief) that 'it may be conceded, without deciding, that the returns were not admissible' in the circumstances of that case since their introduction was 'harmless.' The only case

> other than *Klein* of which we are aware approving introduction by the United States of a subsequent return is *Lisansky* v. *United States*, 31 F.2d 846, 851 (4th Cir. 1929). *Klein* gives a much more precise standard with examples of when a subsequent return may be found relevant, and is the first case to state expressly that such a decision rests within the sound discretion of the trial court." Appendix C, *infra*, page 15a

The Court of Appeals held that a 1971 income tax return is probative evidence of a likely source of taxable income in the years 1966 through 1970 and that the trial court did not err in admitting the return generally, with no limiting instructions. Contrary to the assertion of the Government in its motion to publish the *Klein* decision, such a holding does not give "a much more precise standard with examples" for determining when a subsequent return is admissible. Rather, the Tenth Circuit has provided to the United States virtually unlimited authority to introduce subsequent income tax returns in a net worth income tax evasion prosecution without any limiting instructions.

In light of the importance of the question and the fact that the *Klein* decision will serve as precedent for the Government in future income tax evasion cases in the Tenth Circuit and other circuits, certiorari is required.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant a writ of certiorari and reverse the judgment of the Tenth Circuit summarily, or, in the alternative, calendar the case for argument on the merits.

Respectfully submitted,

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May 5, 1975

APPENDIX

APPENDIX A

Opinion Below

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1923

UNITED STATES OF AMERICA, *Appellee,*

v.

BEN KLEIN, *Appellant*

Appeal from the United States District Court for the District of Colorado

(D.C. # 73-CR-113)

February 4, 1975

Before LEWIS, Chief Judge, SETH and BARRETT, Circuit Judges.

SETH, Circuit Judge.

Ben Klein appeals from his conviction on five counts of violating 26 U.S.C. § 7201. This section reads in part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . ." The jury found that Klein had violated the section as to his income tax liability for the years 1966 through 1970.

Klein's returns for all the indictment years were prepared by accountants. He based his defense on a combina-

tion of theories to meet the Government's net worth case. The major defense was that Klein had been mentally ill for a number of years, and was so incompetent that he could not have found the intent to *willfully* evade his taxes. He also relied on a generally contemptuous attitude toward money and claimed that mistakes in his returns were made by his accountants. Klein further contended that increases in his net worth which the Government listed as unidentifiable taxable income could be explained and traced to specific sources, including large gifts of cash from his father, Sam Klein. He also urged that the use of the net worth method of proof was improper. These defenses were resolved against him by the jury in reaching its verdict. Many grounds for reversal are asserted on this appeal.

First, it is argued that the trial judge erred in refusing to grant a judgment of acquittal at the close of the Government's case on the grounds that the Government had not met its burden of proof on the issue of defendant Klein's competency. The record shows that Klein was hospitalized shortly after he learned that the investigation into his taxes was being referred to the United States Attorney for prosecution. He was thereafter found competent to stand trial on two separate occasions after hearings, one held in April 1973, and the other in September 1973 on the first day of the trial. We find no error as to these determinations.

At trial the defense was urged that Klein was also not legally competent at the time of the commission of the offenses in that he was too ill to have been capable of forming the specific intent to "willfully evade" his taxes at the times the five returns involved were filed. The test for criminal responsibility in this Circuit is stated in Wion v. United States, 325 F.2d 420 (10th Cir.):

> ". . . [T]hat at the time the accused committed the unlawful act, he was mentally capable of knowing what

> he was doing, was mentally capable of knowing that it was wrong, and was mentally capable of controlling his conduct."

Two psychiatrists and two psychologists testified that Klein was not legally competent at the time of the offense. Their general diagnosis was that he was an obsessive-compulsive, paranoid schizophrenic. In addition, twelve lay witnesses and a handwriting expert gave testimony of erratic behavior and other incidents to support a finding of incompetency. This, of course, rebutted the presumption of sanity and the burden was on the Government to prove competency, which it undertook to do. Competency thus became an element of the offense as it had been for all practical purposes from the outset. United States v. Bettenhausen, 499 F.2d 1223 (10th Cir.); Wion v. United States, 325 F.2d 420 (10th Cir.).

Three psychiatrists and one psychologist testified as part of the Government's case that while Klein was possibly mentally ill, he was competent at the times the offenses were committed. This testimony was supported by that of several lay witnesses. What Klein asserts is that the evidence in favor of incompetency was so overwhelming that it was error to allow the question to go to the jury. We cannot agree. This court held in United States v. Coleman, 501 F.2d 343 (10th Cir.):

> "In order to hold that the court below erred in denying the motion for judgment of acquittal we must be persuaded that, viewing the facts before us and the reasonable inferences to be drawn therefrom in the light most favorable to the government, reasonable men must necessarily possess a reasonable doubt as to defendant's sanity . . . ."

Summarizing the evidence presented here would serve no purpose, and it is sufficient to state that the issue was properly presented to the jury, and there was ample evidence from which the jury could have concluded that Klein was competent. The standard indicated in *Coleman* was

followed. Furthermore, matters of credibility were resolved in the trial court. United States v. Smaldone, 485 F.2d 1333 (10th Cir.). The attempted reliance on Hartford v. United States, 362 F.2d 63 (9th Cir.), is misplaced as the evidence here was clearly conflicting.

The psychiatrists and psychologist who testified during the Government's case had been appointed by the court under 18 U.S.C. § 4244 to examine Klein to determine his competency to stand trial. Klein now urges that it was error to allow these doctors to also testify as to his competency to commit the offense, relying on a Second Circuit decision, United States v. Driscoll, 399 F.2d 135 (2d Cir.). This objection was not raised during the trial, and Klein's attorneys had ample opportunity to cross-examine the Government's doctors concerning their examinations of him. *Driscoll* has been limited to its facts by the Second Circuit. United States v. Matos, 409 F.2d 1245 (2d Cir.). The law in this Circuit under United States v. Julian, 469 F.2d 371 (10th Cir.), is that:

> "Numerous cases recognize that examinations pursuant to § 4244 embrace also the question of capacity to commit the offense. So, therefore, both reason and authority dictate that the dual examination is valid."

No error is involved in allowing the Government's doctors to testify as to Klein's competency to commit the offense, even though they were initially appointed to determine his competency to stand trial. Their examinations were within *Julian*, and the competency issue in all its ramifications was in the case from the outset.

Klein next argues that his conviction must be reversed because of error in the instruction given to the jury on the issue of his competency. The trial judge instructed the jury:

> "A person is not criminally responsible for his conduct if, at the time of the conduct, as a result of mental

disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law.

"As applied to this case, the test for criminal responsibility on the part of the defendant means that before you may return a verdict of guilty, you must be convinced beyond a reasonable doubt that the defendant committed the act with which he is charged, *if you find he did commit the act, he was mentally capable of knowing what he was doing, was mentally capable of knowing it was wrong, and was mentally capable of controlling his conduct.*" (Emphasis added.)

Klein argues that the phrasing of the emphasized portion in effect requires the jury only to find that Klein committed the act, and that the other requirements follow from that finding. Klein's attorneys made no objection to the above instruction when and as given. Without such objection, the instruction will not be reviewed on appeal unless there is "grave error infringing upon the fundamental rights of the accused." Coffman v. United States, 290 F.2d 212 (10th Cir.); United States v. Williams, 440 F.2d 1300 (10th Cir.); Fed.R.Crim. P.30. We find no such error. Also, since no objection was made at the proper time, the apparent meaning, rather than the construction urged on appeal by defendant, must have been accepted. The instructions as a whole make it quite clear to the jury that the question of competency was a separate and essential element of the offense charged. We cannot hold that the phrasing of this one portion of the instructions constitutes plain error, or grave error infringing fundamental rights. The instruction satisfies the standard in *Wion*, even though it does not follow *Wion* verbatim. Kitchens v. United States, 272 F.2d 757 (10th Cir.).

The propriety of the use of the net worth method of proof in this case is raised on appeal. The record shows that during the indictment years, Klein was a practicing attorney and a member of the Colorado legislature. He claims, as

part of his defense, that he was contemptuous of money and paid little attention to it. There was much testimony to the effect that his office was a "pigpen," with files, money, and checks scattered everywhere. Checks would be used as bookmarkers, and frequently would not be cashed for months or years after receipt. Office and personal bills were paid out of the same checking account, and what records were kept were inadequate. Klein was also involved in numerous other business ventures which had poor records. These circumstances provide a basis for use of the net [worth] income method when considered with the testimony of the agents. We are mindful of the dangers inherent in the net worth method of proof as expressed in Holland v. United States, 348 U.S. 121, but after a careful review, we are convinced that the net worth method of proof was properly used. Proper starting figures were arrived at, including the cash figure. The "likely source" under *Holland* was apparent.

Holland established a duty for the Government when using the net worth method of proof to investigate "leads" which are "reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." The opinion also states that: "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

The *leads* involved here include asserted gifts from defendant's father which were developed, dealings with a person named Redd, and a partnership with Dr. Thomas. The latter was an investment venture and the income tax returns for the partnership showed Klein as having an ordinary loss of $439.45 and a capital loss of $24,020.36 in 1966, and an ordinary loss of $2,691.25 in 1967. Agent Grimes testified that, although he was aware of the returns, he gave Klein no credit for this "loss." Grimes said this was be-

cause the records for the partnership were confused, and further because Dr. Thomas had lent Klein the money for his initial contribution into the partnership. Grimes stated that partnership losses in excess of basis are not deductible [26 U.S.C. (I.R.C. 1954) § 752], and that Klein's contribution of money loaned from Dr. Thomas was insufficient to provide Klein a basis in the partnership under the tax law. Klein's contributions to the partnership through 1966 totaled about $1,500.00; his total through 1970 was $1,670.00. Klein signed a promissory note to Dr. Thomas in 1972 to settle what he owed Dr. Thomas for contributions to the partnership venture. Klein now argues that the failure of the agent to investigate the Klein-Thomas venture further resulted in an incorrect net worth figure for 1966 and the succeeding years, since the loss was not allowed. The trial judge denied a motion for a judgment of acquittal on this ground and submitted the issue to the jury.

The "leads" point was fully developed by the evidence, and the trial attorneys for Klein accepted the instructions relating to the Thomas matter. After carefully reviewing the facts, we conclude under the prevailing authorities that the Government's asserted failure under *Holland* to follow the "leads" concerning the Klein-Thomas partnership and others were properly submitted to the jury as part of the overall case. *See* United States v. Ramsdell, 450 F.2d 130 (10th Cir.); United States v. Hom Ming Dong, 436 F.2d 1237 (9th Cir.); Lenske v. United States, 383 F.2d 20 (9th Cir.); Mighell v. United States, 233 F.2d 731 (10th Cir.). The Thomas matter, and also the cash gifts, in the final analysis, ceased to be "leads" in the *Holland* sense as the matters were fully developed at trial, and the tax aspects were explored by both sides. The Government's failure to give credit for a "loss" was based on its determination of the applicable tax laws as to the Thomas matter.

Klein's next point on appeal concerns several items admitted into evidence. The major objection is to the admission into evidence over strenuous objection of his 1971 in-

come tax return. This was for the first year following the last indictment year. For the indictment years, Klein paid the following amounts of income tax: $3,279.90 in 1966; $1,853.58 in 1967; $2,408.23 in 1968; $689.00 in 1969, and $319.00 in 1970. The 1971 return shows $55,096.00 in taxable income, with $23,269.00 due in taxes. This reflects a $36,000.00 profit from the law firm. Klein argues that it is unduly prejudicial and improper to allow the jury to see the 1971 return and infer that if he had $55,000.00 of taxable income in 1971, he must have had more than he reported in 1966 through 1970. There is support for his position in the case law: United States v. Baum, 435 F.2d 1197 (7th Cir.); United States v. Stoehr, 196 F.2d 276 (3d Cir.).

Counsel for the Government argues that the 1971 return was admitted for a limited purpose. There is no indication, however, in the transcript of the trial that it was so limited by the court, and we must conclude that the return was admitted generally. *See* United States v. McClain, 440 F.2d 241 (D.C. Cir.).

The standard for review as to the return and other items here questioned is set out in United States v. Twilligear, 460 F.2d 79 (10th Cir.):

> "... The materiality and relevance of proffered evidence, and introduction of same, resides in the sound discretion of the trial court; absent a clear abuse of discretion, an appellant [sic] court is bound to uphold the decision of the trial court...."

The 1971 return indicates a likely source of taxable income, if more proof is needed, to explain the increases in net worth for 1966 to 1970. Also Klein had theretofore introduced his 1971 books and records to substantiate a defense which was actively advanced that some of the income attributed to 1970 by the Government should be allocated to 1971. The 1971 returns were relevant to this issue also. Returns for years subsequent to those under indictment are not per se improper evidence. Lisansky v. United States, 31 F.2d 846 (4th Cir.). We find that the trial judge did

not abuse his discretion in admitting Klein's 1971 income tax return.

The Government concluded its case with a "summary witness" who presented, with the aid of a summary chart, a synthesis of the evidence from the witnesses. Klein did not object at trial to the introduction of the summary chart, and was allowed full cross-examination of the summary witness. The jury was properly instructed on the function of a summary chart both at the time of its introduction and in the final instructions.

During cross-examination of the Government witnesses concerning their work papers for the summary chart, some minor differences were developed among them, and discrepancies between the Government's figures and Klein's figures. These matters were explored, and there was no showing that all of these were "mistakes," and not matters of interpretation. Klein's objection to the summary chart is not completely clear, but he seems to claim that it was error to allow the chart to be used without correcting it to reflect these "mistakes" which he claims were "flatly conceded." He also claims that the summary witness misrepresented that his summary chart covered *all* of the evidence introduced to that point. (Some of the defense exhibits had been introduced at the beginning of the trial pursuant to a stipulation.). The witness was put on the witness stand to summarize the Government's case, and not all of the evidence then in. It does not appear from the transcript that the jury could have been misled in any way concerning the summary chart. The differences among the witnesses were developed but the objections raised on appeal were not raised at trial. The jury was instructed on the proper use of the summaries, and, as indicated, there was adequate opportunity to cross-examine the summary witness. The use of the chart here is proper, and within the rule we announced in Swallow v. United States, 307 F.2d 81 (10th Cir.). *See also* United States v. Michals, 469 F.2d 215 (10th Cir.); Hedrick v. United States, 357 F.2d 121 (10th Cir.).

Several other items of evidence are asserted to be prejudicial and improperly admitted, and so providing grounds for reversal. These include campaign literature of Klein circulated during the indictment years and which urged reduced taxes, and tax reform; suspension of Klein from the practice of law in 1972; the failure of Klein's father, Sam Klein, to file gift tax returns for the alleged cash gifts to the defendant; evidence of numerous purchases made by defendant Klein which were added to his increase in net worth as nondeductible expenses (Klein argued that there was insufficient evidence to identify whether the purchases were personal or business items). Under the standard in United States v. Twilligear, 460 F.2d 79 (10th Cir.), there was no abuse of discretion in the admission of this evidence.

Finally, Klein claims that there was insufficient evidence to support the jury's finding that he *willfully* evaded taxes. We said in United States v. Ortiz, 445 F.2d 1100 (10th Cir.):

> "... The evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—is sufficient if, when taken in the light most favorable to the government, the fact finder may find the defendant guilty beyond a reasonable doubt ...."

The arguments and evidence used by appellant to support this point are essentially the same as those used in the contention that there was insufficient evidence of competency to allow the issue to be presented to the jury. Proof of willfullness may be accomplished by circumstantial evidence. United States v. Ramsdell, 450 F.2d 130 (10th Cir.). The issue of willfullness may be resolved by the jury. United States v. Dowell, 446 F.2d 145 (10th Cir.). There is sufficient evidence from which the jury could have concluded that Klein acted willfully in evading his income taxes for the years 1966 through 1970.

We have considered the other points and issues raised by the appellant and find no error.

AFFIRMED.

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

BEN KLEIN, *Defendant-Appellant.*

No. 73-1923

March 6, 1975

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned case.

The parties and the court have been fully advised by the trial court reporter that in transcription several words were omitted from the court's instruction considered on appeal, and advised as to what these omitted words were. This Court has considered the omission, and finds that it makes no difference as to the conclusion reached nor as to the opinion heretofore filed.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis, Seth and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

APPENDIX B

STATUTES INVOLVED

18 U.S.C. Section 4244, 1970 Ed.

§ 4244. Mental incompetency after arrest and before trial.

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to

the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

26 U.S.C. Section 7201, 1970 Ed.

§ 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

APPENDIX C

Motion of United States To Publish Decision

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

BEN KLEIN, *Defendant-Appellant.*

No. 73-1923

March 20, 1975

The United States, by James L. Treece, United States Attorney, Richard J. Spelts, Assistant United States Attorney, and John W. Madden, Special Assistant United States Attorney, moves this Court for an order that the decision of this Court, filed February 4, 1975, be published, and as grounds states:

1. The decision of this Court, filed February 4, 1975, affirming the conviction of Klein for income tax evasion contains the notation "not for routine publication."

2. The United States believes the decision contains points of law meeting the standards permitting publishing under Local Rule 17, Tenth Circuit Court of Appeals, in that it contains new points of law making the decision of value as a precedent, and contains some legal issues not previously decided by the Tenth Circuit or the Supreme Court. The decision also contains points of law which, in our experience, will solve recurring problems faced by the United States and expedite future trials of tax as well as non-tax matters.

3. SUBSEQUENT TAX RETURN: Not only has this issue not previously been decided by the Supreme Court or the Tenth Circuit, but *Klein* removes the uncertainty as to the present state of the law in the Tenth Circuit left by the statement in *Rose* v. *United States,* 128 F.2d 622, at 625 (10th Cir. 1942) (fn. 49, United States brief) that "it may be conceded, without deciding, that the returns were not admissible" in the circumstances of that case since their introduction was "harmless." The only case other than *Klein* of which we are aware approving introduction by the United States of a subsequent return is *Lisansky* v. *United States,* 31 F.2d 846, 851 (4th Cir. 1929). *Klein* gives a much more precise standard with examples of when a subsequent return may be found relevant, and is the first case to state expressly that such a decision rests within the sound discretion of the trial court.

4. GIFT TAX RETURNS: *Klein* is the first case of which we are aware to decide the issue whether it is proper in meeting a claimed defense of large cash gifts from a third party to introduce evidence that the third party (here the father) failed to file any gift tax returns for the alleged cash gifts. *Klein,* at 2, 13. This is probative as to whether the alleged cash gift was, in fact, made. Alleged cash gifts, in our experience, are a recurring problem for the prosecution to meet in tax evasion cases. It would be useful in future cases to have this express example as one means that may be considered when the trial court is faced with exercising its discretion as to what evidence may be admissible in a particular circumstance.

5. STIPULATIONS AND SUMMARIES: *Klein* is the first case of which we are aware that makes it clear the government's summary witness was "put on the witness stand to summarize the government's case, and not all the evidence then in." *Klein,* at 12. Stipulations in cases of voluminous documents, whether tax cases or otherwise, are encouraged. A common problem in our experience has been

the reluctance to stipulate defense exhibits into evidence during the government's direct case for precisely the reason raised by Klein, i.e., the government summary witness either has no opportunity or insufficient time to thoroughly examine defense exhibits prior to his testimony. The clarity of this Court's decision on this issue will expedite future trials.

6. *18 U.S.C. § 4244: Klein* is the first case of which we are aware that holds that government psychiatrists and psychologists, appointed under 18 U.S.C. § 4244 to examine a defendant as to his competency to stand trial, may also testify at trial as to the defendant's sanity at the time of the alleged commission of the offense even though the original appointment did not expressly so provide where the defendant's sanity was "in the case from the outset."

WHEREFORE, the United States requests that this Court enter an order removing the designation "not for routine publication," and insert instead the designation "publish" on the opinion.

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